

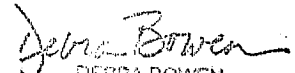
**STATE OF CALIFORNIA**

**OFFICE OF ADMINISTRATIVE LAW**

**2007 OAL Determination No. 5  
(OAL File # CTU 06-0906-02)**

ENDORSED FILED  
IN THE OFFICE OF

2007 APR -6 PM 1:53

  
DEBRA BOWEN  
SECRETARY OF STATE

**REQUESTED BY: MICHAEL MERINO**

**CONCERNING: DEPARTMENT OF GENERAL SERVICES – DIVISION OF  
STATE ARCHITECT – POLICY 06-01 – RETENTION OF  
ORIGINAL DOCUMENTS**

**DETERMINATION ISSUED PURSUANT TO  
GOVERNMENT CODE SECTION 11340.5.**

**SCOPE OF REVIEW**

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to whether the challenged rule violates the prohibition in Government Code section 11340.5<sup>1, 2</sup> and is an “underground regulation” as defined in Title 1, California Code of Regulations, section 250.<sup>3</sup> OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

**ISSUE**

The sole issue for OAL is whether Policy 06-01, entitled “Record Sets”, which contains procedures established by the Department of General Services, Division of State Architect (DSA) for approving kindergarten through 12<sup>th</sup> grade or community college plans or specifications and returning those plans or specifications to the submitting architect or engineer, violates Government Code section 11340.5 and constitutes an underground regulation.

**DETERMINATION**

Policy 06-01 is a building standard required to be filed with the Secretary of State pursuant to Health and Safety Code section 18938, rather than Chapter 3.5 of the APA. For this reason, section 11340.5, subdivision (a), does not apply to Policy 06-01, and thus, OAL cannot find Policy 06-01 to be an underground regulation under section 11340.5, subdivision (b).

<sup>1</sup> See section entitled **Underground Regulations** for the text of Government Code section 11340.5.

<sup>2</sup> Unless specified otherwise code references are to the California Government Code.

<sup>3</sup> See section entitled **Underground Regulations** for the text of Title 1, Cal. Code Regs., section 250.

## **FACTUAL BACKGROUND**

On September 6, 2006, Mr. Michael Merino (Petitioner) submitted a petition to OAL, alleging that DSA employs an underground regulation in violation of section 11340.5. The alleged underground regulation is Policy 06-01, entitled "Record Sets" (Policy 06-01). Policy 06-01 states that

"The purpose of this policy is to implement the statutory requirements of Section 17304 of the California Education Code and provide guidance pending revision of the regulations in Section 4-318 of Title 24, Part 1. The Education Code requires the creation of a copy (known as the Record Set) of the final approved set of plans and specifications, by the Department of General Services, at client expense."

Education Code section 17304 applies to the approval of a kindergarten through 12th grade or community college building plan or specification. Section 4-318 of Title 24 of the Building Standards Code, permitted the client to retain the building plan or specification and provide a copy of the approved documents to DSA.

Policy 06-01 requires that the plans and specifications be held by DSA until an official Record Set is made. Within five working days the original documents are initialed and dated by DSA and made available to return to the submitting architect or engineer. Policy 06-01 requires the submittal of a form (DSA-145) that indicates how the originals will be retrieved – in person or via delivery. In the case of delivery the submitting architect or engineer must sign a statement exempting the state from liability in the event of any damage or loss. The approval letter will be issued no later than five working days after the documents have been approved. According to Policy 06-01, DSA is not currently charging for the creation of the Record Set, but they reserve the right to do so at a later date.

## **PETITIONER'S ARGUMENT**

The Petitioner argues that the use of Policy 06-01 is an underground regulation. The Petitioner also argues that Policy 06-01 encompasses a seizure of his professional private property. This Determination will address only the issues raised by the Petitioner's challenge to an alleged underground regulation. OAL has no authority to make a decision on whether Policy 06-01 results in a seizure of professional private property.

## **DSA RESPONSE**

In its reply to the petition, DSA argues:

1. The petition is outside the scope of OAL's jurisdiction. DSA asserts that Policy 06-01 is exempt from OAL review because it is a building standard. DSA is charged with providing design and construction oversight for kindergarten through 12th grade schools as well as community colleges. This requires DSA to adopt building standards applicable to these schools. The Building Standards Commission is charged with approving building standards. Therefore, DSA contends that Policy 06-01 is not subject to review by OAL.
2. That Policy 06-01 is simply a restatement of existing law and therefore is the only legally tenable interpretation of the relevant statute.<sup>4</sup>

## UNDERGROUND REGULATIONS

Section 11340.5 prohibits state agencies from issuing rules unless the rules comply with the Administrative Procedure Act (APA). It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter [Chapter 3.5].

(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter [Chapter 3.5], the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in Section 11342.600.

....

When an agency employs a rule in violation of section 11340.5 it is employing an underground regulation. "Underground regulation" is defined in Title 1, Cal. Code Regs. § 250 as follows:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a

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<sup>4</sup> OAL notes that Policy 06-01 does not repeat any language in Education Code section 17304 or any other statute or regulation, and cannot, therefore, be a restatement of existing law. Additionally, there are a number of ways in which the records could be handled and returned, so Policy 06-01 is not the only legally tenable interpretation of Education Code section 17304.

regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

OAL is empowered to issue a determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5, subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference"<sup>5</sup> in any subsequent litigation of the issue.

### ANALYSIS

Government Code section 11340.5 prohibits a state agency from employing a rule which has not "...been filed with the Secretary of State pursuant to [Chapter 3.5]." Section 11343, which is found in Chapter 3.5, states:

Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.

....

(e) Transmit to the California Building Standards Commission for approval a certified copy of every regulation, or order of repeal of a regulation, that is a building standard, together with a citation of authority pursuant to which it or any part thereof was adopted, a copy of the notice of proposed action required by Section 11346.4, and any other records prescribed by the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).

Section 18938 of the Health and Safety Code requires building standards to be filed with the Secretary of State. Subdivision (a) of section 18938 provides:

(a) Building standards shall be filed with the Secretary of State and codified only after they have been approved by the commission and shall not be published in any other title of the California Code of Regulations. Emergency building standards shall be filed with the Secretary of State and shall take effect only after they have been approved by the commission as required by Section 18937. The filing of building standards adopted or approved pursuant to this part, or any certification with respect thereto, with the Secretary of State, or elsewhere as required by law, shall be done solely by the commission.

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<sup>5</sup> *Grier v. Kizer* 219 Cal.App.3d 422, 268 Cal.Rptr. 244; 1990

As provided in the California Building Standards Law (Health and Safety Code sections 18901 through 18949.6), the Building Standards Commission (BSC) is responsible for reviewing and approving building standards proposed and adopted by state agencies. BSC codifies and publishes the approved building standards in one comprehensive state building standards code (California Code of Regulations, Title 24). DSA, among other state agencies, may propose building standards (other than emergency standards) only via the annual building code adoption cycle process.<sup>6</sup>

California Code of Regulations (CCR), Title 24, also known as the California Building Standards Code, is a compilation of three types of building standards from three different origins:

- Building standards that have been adopted by state agencies without change from building standards contained in national model codes;
- Building standards that have been adopted and adapted from the national model code standards to meet California conditions; and
- Building standards, authorized by the California Legislature, that constitute extensive additions not covered by the model codes that have been adopted to address particular California concerns.

Section 11356<sup>7</sup> of the APA exempts building standards from OAL review, but requires building standards to comply with Article 5 of the APA.<sup>8</sup> If Policy 06-01 is a building standard, as argued by DSA, it is the responsibility of BSC to review and approve it.

Health and Safety Code section 18909 defines a "building standard" in part as

(a) "Building standard" means any rule, regulation, order, or other requirement, including any amendment or repeal of that requirement, that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction, alteration, improvement, repair, or rehabilitation of a building, structure, factory-built housing, or other improvement to real property, including fixtures therein, and as determined by the commission.

(b) Except as provided in subdivision (d), "building standard" includes architectural and design functions of a building or structure, including, but not limited to, number and location of doors, windows, and other

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<sup>6</sup> For a detailed discussion of the process used to adopt a building standard, refer to [www.bsc.ca.gov](http://www.bsc.ca.gov)

<sup>7</sup> Government Code section 11356 provides:

(a) Article 6 (commencing with Section 11349) is not applicable to a building standard.

(b) Article 5 (commencing with Section 11346) is applicable to those building standards, except that the office shall not disapprove those building standards nor refuse to publish any notice of proposed building standards if either has been approved by, and submitted to, the office by the California Building Standards Commission pursuant to Section 18935 of the Health and Safety Code.

<sup>8</sup> There are several other general APA exemptions and other agency-specific exemptions, but they are not relevant to this discussion.

openings, stress or loading characteristics of materials, and methods of fabrication, clearances, and other functions.

....

The question is whether Policy 06-01 is properly classified as a "building standard." Unfortunately, Health and Safety Code section 18909 has not been fully interpreted by a court or other secondary sources. In *International Association of Plumbing and Mechanical Officials, et al. v California Building Standards Commission*, 55 Cal.App.4<sup>th</sup> 225, (1997), the court paraphrased Health and Safety Code section 18909 as follows:

A building standard is, in essence, a rule, regulation, order, or other requirement which regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction, alteration, improvement, repair or rehabilitation of buildings, structures, or other improvements to real property. (§ 18909, subd. (a).)

However, this language includes only subdivision (a), not subdivision (b) which includes "architectural and design functions." We must, therefore, look to the specific circumstances surrounding the DSA and building standards.

DSA has jurisdiction over all aspects of construction for certain schools and essential services buildings to ensure that plans, specifications, and construction comply with the building code (Title 24 of the California Code of Regulations).<sup>9</sup> DSA provides plan review and construction oversight for all construction on the following facilities:

- Public elementary and secondary schools (grades K-12)
- Public community colleges
- All state-owned or state-leased essential services buildings<sup>10</sup>

All construction, including plans and specifications, must be reviewed and approved by DSA (except for specified exceptions that are not relevant here) before a contract for construction can be awarded. The processes and procedures for review and approval are set forth in Title 24, the Building Standards Code.<sup>11</sup>

The Building Standards Code currently contains section 4-318, entitled "Procedure for Approval of Application and Voidance of Application." This section contains the requirements for the copying and returning of plans which DSA enforced before issuing Policy 06-01. Section 4-318 states, in relevant part:

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<sup>9</sup>Education Code sections 17280-17317, 17365-17374 and 81130-81147.

<sup>10</sup> For a more complete discussion of DSA's function, see the DSA web site:

<http://www.dsa.dgs.ca.gov/ProjectSubmittalProcess/juris.htm> (as of March 27, 2007)

<sup>11</sup> Refer to Sections 101.17 and 101.17.12 of Part 2, Title 24 for more information regarding the scope and application of DSA adopted regulations. <http://www.dsa.dgs.ca.gov/CodeChanges/default.htm> (as of March 27, 2007)

4-318. Procedure for Approval of Application and Voidance of Application.

(a) General. After DSA has completed its check of the documents submitted with the application, the checked prints of the plans and specifications, with the items marked for corrections and/or requests for additional information noted thereon, shall be returned to the responsible architect or registered engineer. When plans and/or specifications require extensive corrections, a corrected set of prints of the plans and specifications shall be submitted for review if requested by DSA.

When the requested corrections have been made and/or the additional information has been provided by the responsible architect or registered engineer, an employee representative of the architect or registered engineer shall return the check set of plans and specifications along with the original plan tracings, the corrected specification pages and specification master cover sheet to DSA for backchecking....

Building standard section 4-318 was properly approved by BSC to be adopted as part of the Building Standards Code, Title 24.<sup>12</sup> It is for this section that Policy 06-01 is, by its terms, intended to "provide guidance."

Health and Safety Code section 18942.1 subdivision (b)<sup>13</sup> requires BSC to send a proposal by a state agency to adopt a building standard to OAL if the proposal does not deal directly with the implementation or enforcement of a building standard. DSA's procedure for dealing with architectural plans was approved by the BSC and not referred to OAL. Policy 06-01 is intended to provide guidance to the implementation of section 4-318. Therefore, in light of the approval by the BSC of building standard section 4-318 and the fact that Policy 06-01 is expressly intended to provide guidance for section 4-318, OAL finds that Policy 06-01 is a building standard.

Pursuant to Section 11343, building standards must be filed with the Secretary of State in compliance with the State Building Standards Law (Part 2.5 (commencing with section 18901) of Division 13 of the Health and Safety Code). The Building Standards Law at section 18938 of the Health and Safety Code provides:

(a) Building standards shall be filed with the Secretary of State and codified only after they have been approved by the [Building Standards Commission] and shall not be published in any other title of the California Code of Regulations.

<sup>12</sup> See Title 24 section 4-318. Procedure for Approval of Application and Voidance of Application.

<sup>13</sup> Health and Safety Code section 18942.1(b) provides:

(b) If an administrative regulation or order of repeal is filed with the commission and it does not directly apply to the implementation or enforcement of a building standard, it shall not be submitted to the commission for action, but, instead, the commission shall transmit the regulations to the Office of Administrative Law and notify the submitting agency of this action.

Building standards, then, are filed with the Secretary of State by the BSC pursuant to Health and Safety Code section 18938. They are not filed with the Secretary of State by OAL pursuant to section 11343, which is in Chapter 3.5 of the APA. Section 11340.5 limits the prohibition against "underground regulations" to those that should have been filed with the Secretary of State pursuant to Chapter 3.5. Therefore, because Policy 06-01 is a building standard and is not required to be filed with the Secretary of State pursuant to Chapter 3.5, section 11340.5, subdivision (a), does not apply, and thus, OAL cannot find it to be an underground regulation under section 11340.5, subdivision (b).

We note, however, that while OAL cannot find that Policy 06-01 is an underground regulation, proposed building standards must comply with the requirements established for the adoption of building standards. The requirements for the adoption of a building standard are under the authority of BSC and the validity of Policy 06-01 is under the jurisdiction of BSC. DSA has indicated that they plan to amend this "inaccurate and confusing section (4-318) which is in conflict with the requirements in Policy 06-01 in the next model code cycle."


### CONCLUSION

Policy 06-01 is a building standard required to be filed with the Secretary of State pursuant to Health and Safety Code section 18938, rather than Chapter 3.5 of the APA. For this reason, section 11340.5, subdivision (a), does not apply to Policy 06-01, and thus, OAL cannot find Policy 06-01 to be an underground regulation under section 11340.5, subdivision (b).

Date: April 6, 2007

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